UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

MARISSA F., A MINOR, BY AND THROUGH HER PARENTS, MARK AND LAVINIA F., et al. Plaintiffs v. THE WILLIAM PENN SCHOOL DISTRICT Defendant	CIVIL ACTION No. 04-286

MEMORANDUM

September __, 2005

In this action, plaintiff Marissa F. ("Marissa"), a minor child with learning disabilities, and her parents, Mark and Lavinia F. (collectively "plaintiffs"), seek to recover the costs of several years of private education for Marissa, contending that defendant William Penn School District ("the District") failed to fulfill federally-mandated requirements, both substantive and procedural, for the education of children with disabilities. Plaintiffs argue that the District violated both the Individuals with Disabilities Education Act ("IDEA"), 20 U.S.C. § 1400 *et seq.*, and Section 504 of the Rehabilitation Act of 1973 ("Section 504"), 29 U.S.C. § 794, by failing to identify Marissa as a disabled child and to provide her with a free and appropriate public education. The District argues that plaintiffs' claims are untimely, and also fail on their merits.

Prior to reaching this court, the District's treatment of Marissa F. was reviewed by a Special Education Hearing Officer (the "Hearing Officer") and subsequently by a Special Education Due Process Appeals Review Panel (the "Appeals Panel"), as per Pennsylvania regulations. 22 Pa. Code § 14.162 (describing the two-tiered administrative hearing process for resolving IDEA disputes). In the present case, the plaintiffs dispute the Appeals Panel's decision, which denied them tuition reimbursement.

Both parties moved for judgment on the administrative record, or, in the alternative, for summary judgment, and the court has heard argument on those motions. Based on the parties' submissions, and the administrative record, judgment in favor of the District is warranted. Accordingly, the District's motion for judgment on the administrative record will be granted, and plaintiffs' motion will be denied.

I.

In August 1995, when Marissa was six years old, her parents, Mr. and Mrs. F., completed an application to enroll her in a William Penn School District school.[1] Subsequently, however, they decided to send Marissa to a private school–the St. Laurence School in Upper Darby.[2] During the 1995-1996 school year, Marissa attended first grade

[1]This account is drawn largely from the administrative decisions.

[2]Marissa's parents claimed at the administrative hearing that they had enrolled Marissa with the District for the 1996-1997 school year, not the 1995-1996 school year. The Hearing Officer and Appeals Panel rejected this testimony by Mrs. F., choosing instead to give credence to the enrollment application, which was dated August 1995. This rejection of Mrs. F.'s testimony was based in part on the date marked on the application–August 1995–but also in part on the supporting documentation attached to the

at St. Laurence. While at St. Laurence, Marissa experienced academic difficulties. She was described as a child with a learning disability in an official psychological evaluation in spring 1996, by a psychologist from the Delaware County Intermediate Unit. (The District does not dispute Marissa's designation as a child with a learning disability.) The psychological evaluation determined that Marissa had "difficulties with language and verbal comprehension [which were] affecting her ability to learn." The evaluation, which was shared with Marissa's parents, recommended that Marissa transfer to public school, where she could be provided with intensive reading and language therapy services. At that time, the Intermediate Unit notified the District that Marissa might be eligible for special education services.

However, Marissa's parents did not opt to enroll her in the District's public schools. Instead, they sent her to the Stratford Friends School, where she was a student for the next five school years, from 1996-1997 through 2000-2001. During this time, the District provided Marissa's transportation to Stratford Friends. While most of Marissa's parents' discussions with District personnel concerned Marissa's transportation, the administrative record shows that the District also sought to evaluate Marissa's educational needs, **but that the plaintiffs did not consent to such an evaluation.**

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application: namely, a car registration that would have been expired by August 1996, and information about Marissa's kindergarten placement, which would presumably have been replaced by information about her first grade school placement in a 1996 application. There is no basis in the record for rejecting this finding.

Mrs. F. testified that, during the summer of 1996, she spoke with Ronald Van Langeveld, then the District's Director of Special Services, and informed him that she had a daughter attending St. Laurence School who had been tested, had a learning disability, and would probably need special education. According to Mrs. F.'s testimony, Mr. Van Langeveld requested a copy of the evaluation from the Intermediate Unit, and she provided it. Mrs. F testified further that Mr. Van Langeveld indicated that he would follow up on the matter but did not do so. The District asserted that it did not receive a copy of the report until spring 2002.

In the fall of 1996, shortly after school began, Dr. Marianne B. Martino of the District called the plaintiffs, and spoke with Marissa's father. Dr. Martino testified that she offered to have Marissa's special education needs evaluated by the District, but Marissa's father declined the offer, because he and his wife had decided to send Marissa to Stratford Friends. Both Mr. and Mrs. F. testified that Dr. Martino did not make such an offer, but only asked where Marissa was attending school. The Hearing Officer credited Dr. Martino's testimony, and there is no contrary nontestimonial evidence.

In September 2000, Dr. Marlene Moore, then the District's Supervisor of Special Education, contacted the family. Dr. Moore testified that she had a conversation with Marissa's mother, in which she offered to evaluate Marissa. According to Dr. Moore, Mrs. F. said that she was thinking about returning Marissa to the District, and Dr. Moore then told Mrs. F. to let her know if she wanted Marissa evaluated. Mrs. F. testified that

when Dr. Moore told her to think about it and to let her know whether she wanted an evaluation, Mrs. F thought she was being told that the District was not an appropriate place for Marissa. However, the Hearing Officer interpreted this exchange as an offer from the District to evaluate Marissa should her parents decide to return her to District schools, rather than a rebuff to an attempt to return her to District schools. There is no contrary evidence except Mrs. F.'s testimony. In addition, Mrs. F.'s testimony seems in some tension with testimony by both Mr. and Mrs. F. admitting that, prior to the spring of 2002 when they sought a due process hearing, they did not want the District to offer Marissa a special education program.

Marissa remained a student at Stratford Friends through the end of the 2000-2001 school year. At that point, Marissa had completed the equivalent of sixth grade (Stratford Friends is an ungraded school), and was ready to move on to another school. Her parents briefly considered sending her to a District school, but chose instead to send her to Delaware Valley Friends School for seventh grade. Because Delaware Valley Friends was more than ten miles outside the District's boundaries, the District refused to provide transportation for Marissa or to reimburse her parents' transportation expenses. This dispute eventually led her parents to request mediation and, on March 31, 2002, they formally requested a due process hearing. Subsequently, Marissa's parents engaged counsel.

Once the F.'s expressed a desire for District involvement in Marissa's education,

the District evaluated Marissa's special education needs, completing an initial "individual education program" ("IEP") in July 2002. In October 2002, after some delay to complete a speech and language evaluation, the District finalized its IEP for Marissa. Plaintiffs claim that the evaluation and the IEP were inadequate and unreasonably tardy. The District counters that the final IEP was both legally adequate and timely.

At the due process hearing, held in several sessions from October 2002 through April 2003, Marissa's parents not only challenged the District's refusal to provide transportation, but contended that the District had failed to meet its obligation to provide a free and appropriate public education, under the Individuals with Disabilities Education Act ("IDEA"), and under Section 504 of the Rehabilitation Act of 1973 ("Section 504"). They claimed that the District had failed to provide Marissa with an IEP, and had failed to conduct adequate "child find" activities to notify parents of children with disabilities of their rights to special education. The plaintiffs argued that the District should therefore be required to reimburse Marissa's tuition costs from 1996 onward and to provide her with compensatory education.

As to the tuition reimbursement claims, the Hearing Officer found that the plaintiffs had delayed too long before seeking relief. Applying a limitations period adopted by the Third Circuit in *Bernardsville Bd. of Educ. v. J.H.*, 42 F.3d 149, 157-58 (3d Cir. 1994), the Hearing Officer found that the plaintiffs should not have waited to seek relief for more than one year after the District's allegedly wrongful actions began.

He also found that the District's "child find" activities were legally sufficient. Despite these rulings, and his finding that the 2002 IEP was adequate, the Hearing Officer nonetheless awarded plaintiffs tuition reimbursement for the 2001-2002 and 2002-2003 school years. In June 2003, the Special Education Due Process Appeals Review Panel ("Appeals Panel") reversed this award and denied all tuition reimbursement. The Appeals Panel affirmed those portions of the Hearing Officer's decision that rejected the plaintiffs' claims for compensatory education and their challenge of the 2002 IEP.

Plaintiffs then filed this action, again seeking tuition reimbursement for the entire period beginning when Marissa entered first grade in 1996. Plaintiffs also request compensatory education, although they do not specify what sort of compensatory education Marissa might require.

II.

The Individuals with Disabilities Education Act ("IDEA"), 20 U.S.C. § 1400 *et seq.*, requires state public schools that receive federal money to provide "free and appropriate public education" to all students with disabilities. 20 U.S.C. § 1412. To be sure that they are doing so, the school districts must seek to locate all children within their jurisdiction who are eligible for special education services, through so-called "child find" activities, under regulatory standards set by each state.

Once a child is identified as eligible for special education services, and her parents give permission, the district must conduct an evaluation and design an "individual

education program" or IEP appropriate for the child, following statutory guidelines. 20 U.S.C. § 1414(d)(1)(A); *see S.H. v. State-Operated Sch. Dist. of the City of Newark*, 336 F.3d 260, 264 (3d Cir. 2003). The IEP must be calculated to confer a "meaningful educational benefit" on the child, although not necessarily the maximum possible benefit. *S.H.*, 336 F.3d at 271 ("The IDEA does not require the School District to provide [a disabled student] with the best possible education.").

Each state must establish administrative review procedures for parents aggrieved by school districts' special education decisions. Pennsylvania provides a two-step review process, which includes an initial due process hearing and decision by an administrative Hearing Officer, followed by an appellate review by the Appeals Panel. *See* 22 Pa. Code § 14.162.

A. Standard of Review

The parties style their motions as either motions for judgment on the administrative record or motions for summary judgment. Because the record presents clear disputes as to the material facts of the case, as shown by the foregoing recitation of the facts, summary judgment is not appropriate. Fed. R. Civ. P. 56(c). Thus, the court will consider the pending motions as motions for judgment on the administrative record. The court reviews administrative decisions in IDEA cases under a modified *de novo* standard. The court must give "due weight" to the administrative findings of fact, but it may disagree with those findings if it can point to "contrary nontestimonial extrinsic evidence

on the record." *S.H.*, 336 F.3d at 270.[3] This possibility, however, "is by no means an invitation to the courts to substitute their own notions of sound educational policy for those of the school authorities which they review." *Bd. of Educ. of Hendrick v. Rowley*, 458 U.S. 176, 206 (1982); *see S.H.*, 336 F.3d at 270 (citing *Susan N. v. Wilson Sch. Dist.*, 70 F.3d 751, 757 (3d Cir. 1995)).

B. Tuition Reimbursement

The critical question regarding plaintiffs' tuition reimbursement claims is whether they were timely raised. Plaintiffs waited almost six years from the time the District's allegedly wrongful actions began until they raised the issue of tuition reimbursement for Marissa's private school tuition. Plaintiffs contend that their claims for tuition reimbursement sho**uld not be time-barred, challenging both the Appeals Panel's complete rejection of tuition reimbursement and the Hearing Officer's denial of tuition reimbursement for 1996 to 2001.**

Although the IDEA contains no express statute of limitations, the Third Circuit has found that equitable considerations require parents who object to school districts' treatment of their children to raise their concerns promptly. Specifically, in cases seeking tuition reimbursement when children are sent to private schools, the court has found that it is unreas**onable for parents to delay seeking relief for more than one year, unless there**

[3]The *S.H.* decision governs cases where, as here, a district court does not hear additional evidence and rather bases its decision on the administrative record. *S.H.*, 336 F.3d at 270 n.3.

are mitigating circumstances. *Bernardsville Bd. of Educ. v. J.H.*, 42 F.3d 149, 157-58 (3d Cir. 1994).

The Hearing Officer applied *Bernardsville* as a bar against recovery for all years prior to the 2001-2002 school year—the year in which plaintiffs' sought IDEA relief. However, allowing recovery for that year is in tension with the Third Circuit's clarification of *Bernardsville* in *Warren G. v. Cumberland County Sch. Dist.*, 190 F.3d 80 (3d Cir. 1999). In *Warren G.*, the court noted that *Bernardsville* had applied its one-year time limitation as a total bar against relief that preceded the parents' request for review proceedings—not as a bar against relief for all years except for the one immediately preceding that request. *Id*. at 84 (citing *Bernardsville*, 42 F.3d at 158). Here, the approach set forth by the Third Circuit in *Warren G.* bars plaintiffs from receiving reimbursement for any time Marissa was in private school before their request for due process in the spring of 2002. Following such a request, the District may also be allowed a reasonable time to remedy its IDEA deficiencies and to provide an acceptable IEP. *Cf. Bernardsville*, 42 F.3d at 159-60 (discussing "a just and proper consideration of the equities and the court's discretionary power to grant 'appropriate relief'" and providing relief where the delay was unreasonable). Therefore, tuition reimbursement is appropriately barred through the end of the 2001-2002 school year, as the Appeals Panel concluded.

Plaintiffs argue that this case presents mitigating circumstances and that

Bernardsville therefore should not bar tuition reimbursement. Marissa's parents' claim, however, is less compelling than the reimbursement claim the Third Circuit considered, and rejected as time-barred, in *Bernardsville*. There, the parents seeking reimbursement had withdrawn their child from his public school only after the District had repeatedly failed to provide an adequate IEP, despite being aware of the child's learning disabilities and the parents' concerns about his lack of progress and inadequate IEP. *Bernardsville*, 42 F.3d at 151-53. The parents in *Bernardsville* sought reimbursement for private school tuition incurred before they had officially petitioned for an administrative hearing, but after the District had been made aware of their displeasure. *Id*. at 153. Unlike Marissa's parents, the parents in *Bernardsville* did not seek reimbursement for any earlier period in which the District was arguably unaware of the deficiencies in its own program. Nevertheless, the Board's notice of the parents discontent, which is noted throughout the Third Circuit's opinion, was not enough to preserve the parents' right to tuition reimbursement. The court found that reimbursement was barred as untimely for the two years preceding the parents' request for an administrative hearing. *Id*. at 151, 157-60.

The court in *Bernardsville* allowed the parents only to recover reimbursement for one year of tuition—for the school year *following* the parents' petition for an administrative hearing. The court found that, in light of the history of the case, the District had unreasonably delayed evaluating the student and establishing an IEP, and that relief could be awarded for the period of uncertainty due to that delay. *Id*. at 153, 159-60.

Of course, *Bernardsville* also differed from the present case, in that the school district there had attempted to formulate an IEP after identifying the student as disabled. Marissa's parents contend that the District here has failed more egregiously in its IDEA obligations, by failing even to provide an IEP (and the attendant notifications of due process rights) despite knowledge of Marissa's disabled status. The record does not support plaintiffs' account of these facts, however. The Hearing Officer and Appeals Panel found that District officials offered to evaluate Marissa and to provide an IEP; nontestimonial evidence on record offers no sound basis for rejecting this conclusion. Accordingly, the District may not be blamed for Mr. and Mrs. F's failure to accept those offers—because parental permission was required for the District to conduct an evaluation of Marissa, the District could not lawfully have evaluated Marissa and formulated an IEP when her parents declined to pursue that option. *Cf. Alex K. v. Wissahickon School District*, 2004 WL 286871 (E.D. Pa. Feb 12. 2004) (denying reimbursement to parents in similar circumstances).

Because claims for tuition reimbursement before the 2002-2003 school year are time-barred, the court need not determine the merits of plaintiffs' claim that the District's "child find" activities in the earlier years were inadequate.[4]

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[4]By 2002, it is clear that the District's "child find" activities were more extensive and in keeping with Pennsylvania's updated regulations. These included notices at District schools, on television, on the District website, and to parents of children receiving transportation from the District. Thus, "child find" requirements also do not support plaintiffs' claims for the period after the 2002 due process request.

C. Adequacy of the 2002 IEP

After the plaintiffs' request for due process, the District conducted an evaluation of Marissa, producing an IEP in July 2002. Plaintiffs claim that alleged deficiencies in this IEP justify tuition reimbursement for the 2002-2003 school year. Since relief for this period is not time-barred, the court must consider the merits of plaintiffs' claims.

Plaintiffs contend that the IEP was inadequate in various ways. In the administrative proceedings, the District bore the burden of showing that the IEP would provide a "meaningful educational benefit" to Marissa. *See S.H.*, 336 F.3d at 271. The Hearing Officer and the Appeals Panel rejected plaintiffs' claims of inadequacy, finding that the IEP was timely developed and calculated to confer the required education benefit. The Appeals Panel noted: "[I]n timely fashion, an educational program addressing the needs identified by the multidisciplinary team (including the parents) in the evaluation was developed, and an appropriate placement was offered." Whether an IEP is appropriate is a question of fact. The court reviews the administrative determination on this point under the modified *de novo* standard. *See id.*

First, plaintiffs argue that even after the 2002 due process request by Marissa's parents, the IEP development process was unreasonably delayed. However, the record establishes that the District acted reasonably. By the end of July 2002—less than two months after Marissa's parents provided written consent for evaluation (by signing a Permission to Evaluate form)–an initial evaluation was conducted and an initial IEP

formulated. Based on additional information, a second Permission to Evaluate was provided and ultimately signed by Marissa's parents in September 2002, a speech and language evaluation was then performed within three weeks, and the IEP was finalized in October 2002. Thus, the District's assessment of Marissa took place within the time constraints set forth by Pennsylvania regulations and did not constitute an unreasonable delay. *See* 22 Pa. Code § 14.153; *see also J.C. v. Central Regional Sch. Dist.*, 81 F.3d 389 (3d Cir. 1996) (providing that districts are entitled to "reasonable time" to remedy inadequate IEPs). Plaintiffs' claims rest, then, on their substantive objections to the IEP.

Plaintiffs' complaints about the IEP are as follows: it provides no special transition plan to ease Marissa's move from Delaware Valley Friends to a District school; it does not provide a reading program or reading specialist; it does not provide a plan to teach Marissa "metacognitive strategies"; it provides expected levels of achievement below mastery level; it does not include goals relating to Marissa's self-esteem, self-advocacy, coping, or performance anxiety; it does not include "peer modeling"; it does not include goals relating to verbal organization; and it provides class sizes that are too large. Plaintiffs do not offer any detailed explanation of why these alleged deficiencies make the IEP unacceptable.

The Hearing Officer and the Appeals Panel did not discuss these issues at length. For example, the Hearing Officer simply found that the IEP and placement "offered by the District for Marissa for the 2002-2003 school year was reasonably calculated to

provide meaningful educational benefit." Nonetheless, there is substantial evidence in the record—including the IEP itself—from which the Hearing Officer could have concluded that the IEP was adequate, and which leads this court to the same conclusion. In fact, contrary to some of plaintiffs' allegations, several challenged items, including metacognitive strategies, personal development (i.e., self-esteem), and verbal organization goals, appear in Marissa's IEP. Testimony of several professional educators employed by the District, which the Hearing Officer appears to have found credible and which the court finds persuasive, establish that the IEP would address all of Marissa's needs sufficiently to provide her with a meaningful educational benefit. Several members of the IEP team—special education teacher Barbara Carr, school psychologist Jim Schwartz, speech and language therapist Jill May, and Melanie Sharps, the director of special education—testified in detail as to how the IEP was designed to meet Marissa's educational needs. They described how the IEP was intended to address various issues and goals—such as the development of reading skills and metacognitive strategies, as well as class size—which the plaintiffs now raise as alleged defects in the IEP.

Thus, despite plaintiffs dissatisfaction with the District's IEP for Marissa, the record does not show that it is legally defective. *Rowley* instructs that it is not the court's place to substitute its ideas of good educational policy for the ideas and techniques adopted by Pennsylvania's educators. 458 U.S. at 206. Although more assistance of the types plaintiffs discuss might have helped Marissa to achieve even greater educational

benefit, the District satisfied its responsibilities. The record shows that the District's IEP offered Marissa a reasonable opportunity to obtain a meaningful educational benefit, and the court may require no more.

D. Compensatory Education

Plaintiffs also seek compensatory education. Compensatory education is a remedy provided when a disabled child fails to receive the free and appropriate public education mandated by IDEA, to compensate for deficiencies in the education the child has received. *See, e.g.*, *Carlisle Area Sch. v. Scott P.*, 62 F.3d 520 (3d Cir. 1995). The Third Circuit has not applied its *Bernardsville* equitable time limitation to compensatory education claims. *See Ridgewood Bd. of Educ. v. N.E.,* 172 F.3d 238 (3d Cir. 1999); *M.C. v. Central Regional Sch. Dist.*, 81 F.3d 389 (3d Cir. 1996); *see also Amanda A. et al. v. Coatesville Area Sch. Dist.*, No. Civ.A. 04-4184, 2005 WL 426090 (3d Cir. Feb 23, 2005).[5] Thus, plaintiffs' compensatory education claims are timely, and must be addressed on their merits.

Cases addressing compensatory education have uniformly involved a substantively inadequate education: A child who is kept in public school with no adequate special education plan, or is assigned to an inadequate private placement, may be awarded hours (or months, or years) of compensatory education—which might include such things as

[5]The Pennsylvania courts have applied *Bernardsville*'s limitation to compensatory education claims. *Montour Area Sch. Dist. v. S.T.*, 805 A.2d 29, 40 (Pa. Commw. 2002). However, state court interpretation of federal law is not binding on the federal courts.

tutoring, speech therapy, or summer school—to remedy the ill effects on the child of the inadequate education he or she received. The culpable school district must provide these services, with the award defined by the education services needed. *See, e.g.*, *Lester H. v. Gilhool*, 916 F.2d 865 (3d Cir. 1990).

This case does not fit the compensatory education mold. Here, plaintiffs enrolled Marissa in private school so that she would receive an adequate education, and agree that this is what she received. The defect for which plaintiffs seek "compensatory education" is not an academic flaw, but a financial one: Marissa's education was deficient, plaintiffs argue, because the District did not pay for it. This seems to be not an argument for compensatory education, but a rephrasing of the claim for tuition reimbursement. An award of compensatory education for the time Marissa spent in private school simply does not make sense, as there was no deficiency in her education that would require compensation. Moreover, the court has found that Marissa's parents did not allow the District an opportunity to provide a public school education for Marissa. Given that history, the court finds that it would be inequitable now to require the District to provide compensatory education. Since compensatory education is an equitable remedy, no award would be proper.

E. Other Claims

Plaintiffs also bring claims for violations of Section 504 of the Rehabilitation Act of 1973 ("Section 504"), and § 1983 claims alleging assorted constitutional violations.

These depend on plaintiffs' IDEA claims, which the court has found unpersuasive, and thus do not warrant relief. *See Gregory R. v. Penn Delco Sch. Dist.*, 262 F. Supp 2d 488, 493 (E.D. Pa. 2003) (dismissing similar claims).

III.

For the foregoing reasons, defendant's motion for judgment on the administrative record will be granted.

UNITED STATES DISTRICT COURT

FOR THE EASTERN DISTRICT OF PENNSYLVANIA

MARISSA F., A MINOR, BY AND THROUGH HER PARENTS, MARK AND LAVINIA F., et al. Plaintiffs v. THE WILLIAM PENN SCHOOL DISTRICT Defendant	CIVIL ACTION No. 04-286

ORDER

September __, 2005

For the reasons stated in the foregoing memorandum opinion, it is hereby ORDERED that:

(1) Plaintiffs' Motion for Judgment on the Administrative Record, or Alternatively for Summary Judgment (Docket #20) is DENIED;

(2) Defendant's Motion for Judgment on the Administrative Record (Docket #16) is GRANTED;

(3) JUDGMENT is ENTERED in favor of Defendant, dismissing Plaintiffs' complaint.

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Pollak, J.